

U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: September 26, 2000

CASE NO.: 2000-BLA-437

In the Matter of

JERRY RODNEY HAGY,
Claimant

v.

RAPOCA ENERGY COMPANY,
Employer

and

SECURITY INSURANCE OF HARTFORD,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* ("Act"), filed on September 29, 1998. (DX 1).¹ The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

¹ The following abbreviations are used for reference within this opinion: DX-Director's Exhibits; EX- Employer's Exhibit; TR- Hearing Transcript; Dep.- Deposition.

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis (“black lung disease” or “coal workers pneumoconiosis” “CWP”) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his first prior claim for benefits on February 7, 1995. (DX 28-1). On August 3, 1995, the claim was denied because the evidence failed to establish Mr. Hagy had coal workers’ pneumoconiosis, that CWP was caused in part by coal mine work and that he was totally disabled due to pneumoconiosis. (DX 28-24). On August 5, 1996, the claimant requested a modification. (DX 28-26). On August 7, 1996, the District Director issued a Proposed Decision and Order Denying Request For Modification. (DX 28-30).

The claimant filed his claim for benefits on September 29, 1998. (DX 1). On February 9, 2000, the claim was denied by the District Director because the evidence failed to establish the elements of entitlement, that Mr. Hagy has coal workers’ pneumoconiosis, that CWP was caused in part by coal mine work and that he is totally disabled due to pneumoconiosis. (DX 12). On February 27, 1999, the claimant requested a hearing before an administrative law judge. (DX 13). On October 1, 1999, a Proposed Decision and Order was issued denying the claimant benefits. (DX 25). On November 1, 1999, the claimant requested a hearing before an administrative law judge. (DX 27). On February 2, 2000 the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers’ Compensation Programs (OWCP) for a formal hearing. (DX 29). I was assigned the case on April 12, 2000.

By letter dated August 16, 2000, claimant requested that his claim be decided on the evidence of record without an oral hearing. By order dated August 22, 2000, I granted claimant’s request for a decision on the record. On June 2, 2000 and July 28, 2000, the employer requested employer’s exhibits 1-2 be admitted. Because no hearing was held due to claimant’s request for a decision on the record and no objection was received, I admit employer’s exhibits 1-2.

ISSUES

- I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?
- II. Whether the Miner’s pneumoconiosis arose out of his coal mine employment?

- III. Whether the miner is totally disabled?
- IV. Whether the miner's disability is due to pneumoconiosis?
- V. Whether there has been a material change in the claimant's condition?

FINDINGS OF FACT

I. Background

A. Coal Miner

By letter dated August 16, 2000, the claimant stipulates that he was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for 9.943 years.²

B. Date of Filing

The claimant filed his first claim for benefits, under the Act, on February 7, 1995. (DX 28-1). Claimant filed his duplicate claim for benefits on September 29, 1998. (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator

Rapoca Energy Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations. (DX 15).

D. Dependents³

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Evette. (DX 28-11).

E. Personal, Employment and Smoking History

The claimant was born on September 22, 1946. He married Elizabeth on October 25, 1969 and a Final Decree of divorce was entered September 24, 1980. (DX , DX 6). Claimant

² Where there is more than one operator for whom the claimant worked a cumulative total of at least one year, 20 C.F.R. § 725.493(a)(1) imposes liability on the most recent employer. *Snedeker v. Island Creek Coal Co.*, 5 B.L.R. 1-91 (1982). One year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.493(c).

³ See 20 C.F.R. §§ 725.204-725.211.

subsequently married Evette Rose on October 18, 1980. (DX 28-11). He worked in the coal mines for 9.943 years. The claimant's last position in the coal mines was that of a welder and mechanic. (DX 28-4).

II. Medical Evidence

A. Chest X-rays

There were sixteen readings of five x-rays, taken between September 24, 1979 and August 31, 1999.

| Exh. # | Dates: 1. x-ray 2. read | Reading Physician | Qualific- ations | Film Qual- ity | ILO Classif- ication | Interpretation or Impression |
|---------------------------|--|------------------------------|-----------------------------|-------------------------------|-------------------------------------|--|
| DX 20 | 09-24-79 09-24-79 | Sutherland | | | | UICC Category 0 pneumoconiosis. |
| DX 28- 21 | 04-15-87 04-15-87 | Sutherland | | | 1/1 | Opacities in six zones, moderate emphysema, and scarring in each hilus. |
| DX 21 | 04-15-87 05-20-99 | Dahhan | B | | | No parenchymal or pleural abnormalities consistent with pneumoconiosis. |
| DX 21 | 04-15-87 05-05-99 | Wheeler | B; BCR | 2 | | Film completely negative. |
| DX 21 | 04-15-87 05-04-99 | Wheeler | B; BCR | 1 | | Film completely negative. |
| DX 28- 20; DX 28-19 | 03-13-95 03-13-95 | Shahan | BCR | 1 | 0/0 | Lungs hyperexpanded, suggesting COPD, lungs are clear. |
| DX 28- 18 | 03-13-95 03-29-95 | Gaziano | B | 2 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis. |
| EX 2 | 03-13-95 05-15-00 | Scott | B; BCR | 1 | | Film completely negative. |
| EX 1 | 03-13-95 05-15-00 | Wheeler | B; BCR | 1 | | Film completely negative. |

| Exh. # | Dates: 1. x-ray 2. read | Reading Physician | Qualific- ations | Film Qual- ity | ILO Classif- ication | Interpretation or Impression |
|---------------|--|------------------------------|-----------------------------|-------------------------------|-------------------------------------|---|
| DX 10 | 11-12-98 11-12-98 | Forehand | B | 1 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis, peribronchial cuffing. |
| DX 11 | 11-12-98 12-03-98 | Duncan | B; BCR | 1 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis, emphysema. |
| DX 26 | 08-31-99 10-24-99 | Fino | B | 1 | | Film completely negative. |
| DX 24 | 08-31-99 08-31-99 | McSharry | | | | Evidence of hyperinflation with no parenchymal infiltrates or abnormalities. |
| DX 24 | 08-31-99 09-02-99 | Scott | B; BCR | 2 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis, possible emphysema. |
| DX 23 | 08-31-99 09-21-99 | Dahhan | B | 1 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis, emphysema. |
| DX 22 | 08-31-99 | Wheeler | B, BCR | 2 | | No parenchymal or pleural abnormalities consistent with pneumoconiosis, emphysema. Hyper-inflation with decreased upper lung markings compatible with emphysema. No evidence of silicosis or CWP. |

* A- A-reader; B- B-reader; BCR- Board-Certified Radiologist; BCP-Board-Certified Pulmonologist; BCI= Board-Certified Internal Medicine. Readers who are Board-certified radiologists and/ or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 N.16, 98 L.Ed. 2d 450 (1987) and, *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to

ILO-U/C International Classification of Radiographs. A chest x-ray classified as category “0,” including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983)(Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997))(en banc)(Unpublished). If no categories are chosen, in box 2B(c) of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies

Pulmonary Function Tests are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV₁) and maximum voluntary ventilation (MVV).

| Physician Date Exh.# | Age Height | FEV ₁ | MVV | FVC | Tracings | Ratio | Compre- hension Cooper- ation | Qual ify* | Dr.'s Impression |
|----------------------------------|---------------|-------------------|-----------|---------------|----------|------------|--|-------------------|---|
| Forehand 03-13-95 DX 28-13 | 48 71" | 1.26 1.86 + | 70 93+ | 2.72 3.51 | Yes | 46% 53% | Good Good | Yes* Yes* + | Partially reversible obstructive ventilatory pattern. (Dr. Michos opined that the 3/13/95 vents and arterial blood gas studies are acceptable. DX 28-13). |
| Forehand 11-12-98 DX 7 | 52 71" | 1.41 1.59 + | 49 58+ | 3.41 3.78+ | Yes | 41% 42% | Satis- factory Satis- factory | Yes* Yes* + | Obstructive ventilatory pattern. (Dr Ranavaya opined that the 11/12/98 vents and arterial blood gas studies are acceptable. DX 9). |
| McSharry 08-31-99 DX 24 | 52 71" | 1.13 1.50 + | 42 | 2.78 4.02+ | Yes | 40% 37% | Good Good | Yes* Yes* + | Chronic severe air flow obstruction with hyper-inflation and may represent end stage asthma or emphysema. |

* A “qualifying” pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table

values set forth in Appendices B and C of Part 718.
+Post-bronchodilator.

For a miner of the claimant's height of 71 inches, § 718.204(c)(1) requires an FEV₁ equal to or less than 2.25 for a male 52 years of age. If such an FEV₁ is shown, there must be in addition, an FVC equal to or less than 2.84 or an MVV equal to or less than 90; or a ratio equal to or less than 55% when the results of the FEV₁ test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV₁/FVC ratio requirement remains constant.

| Height | Age | FEV ₁ | FVC | MVV |
|--------|-----|------------------|------|-----|
| 71 | 48 | 2.32 | 2.91 | 93 |
| 71 | 52 | 2.25 | 2.84 | 90 |

C. Arterial Blood Gas Studies⁴

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O₂) compared to carbon dioxide (CO₂) in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

| Date Ex.# | Physician | pCO ₂ | pO ₂ | Qualify | Physician Impression |
|----------------------|-----------|------------------|-----------------|------------|--|
| 03-13-95 DX 28-17 | Forehand | 42 39+ | 58 75+ | Yes No+ | (Dr. Michos opined that the 3/13/95 vents and arterial blood gas studies are acceptable. DX 28-13) |
| 11-12-98 DX 9 | Forehand | 45 45+ | 55 62+ | Yes No+ | (Dr Ranavaya opined that the 11/12/98 vents and arterial blood gas studies are acceptable. DX 9). |
| 08-31-99 DX 24 | McSharry | 48 | 69 | No | Hypercarbia and mild hypoxemia for age. |

⁴ 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.

20 C.F.R. § 718.204(c) permits the use of such studies to establish "total disability." It provides:

In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs

(c)(1), (2), (3), (4), or (5) of this section shall establish a miner's total disability: . . .

(2) Arterial blood gas tests show the values listed in Appendix C to this part . . .

+ Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

D. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(c)(1), (2), or (3), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable

clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Forehand, Board-certified in allergy and immunology, and qualified as a B-reader, examined the claimant on March 13, 1995. (DX 28-14). Dr. Forehand noted claimant had twenty years of underground coal mine employment. Dr. Forehand reported the claimant started smoking in 1970 and is currently smoking one half a pack of cigarettes per day. Claimant complained of daily productive cough, wheezing, dyspnea, hemoptysis, chest pain and orthopnea. Dr. Forehand noted that an x-ray revealed no CWP; the pulmonary function study showed an obstructive ventilatory pattern; an arterial blood gas study showed hypoxemia at rest with improvement after exercise; and, an EKG showed a left atrial enlargement. Dr. Forehand diagnosed chronic bronchitis, cor pulmonale, and CWP due to cigarette smoking and coal dust exposure. Based on exercise intolerance and pulmonary function studies, Dr. Forehand opined that the claimant is totally and permanently disabled and unable to return to his last coal mine job.

By letter dated July 26, 1995, Dr. Forehand amended his report to reflect the reduction in the alleged number of years of underground mining from twenty years to five years. (TR 28-16). He found evidence of chronic bronchitis and cor pulmonale. Dr. Forehand removed the diagnosis of CWP from his original report because of insufficient evidence of a significant amount of time in underground coal mining. Dr. Forehand opined that cigarette smoking caused the claimant's bronchitis and cor pulmonale. Dr. Forehand opined that the claimant is totally and permanently disabled and is unable to return to his last coal mine job.

In a letter dated August 1, 1996, Dr. Sutherland opined that the claimant continues to have severe respiratory distress with mild exertion and suffers severe wheezing. (DX 28-26). Dr. Sutherland opined that the arterial blood gas study results dated March 13, 1995, qualify claimant for severe respiratory disease associated with pneumoconiosis. Dr. Sutherland opined that the claimant's disability is a direct result of his emphysema and pneumoconiosis and that further exposure to dusty environments will hasten his severe restrictive lung disease.

Dr. Michos, Board-certified in internal medicine and Board-eligible in pulmonary diseases, issued a report dated September 25, 1996. (DX 28-29). Dr. Michos reported 16.34 years of coal mine employment, ending in November of 1989. Dr. Michos reviewed a chest x-ray, pulmonary function study and an arterial blood gas study dated March 13, 1995. He opined that the claimant is not totally disabled due to CWP. Dr. Michos noted that the arterial blood gas study documents an improvement in oxygenation with exercise, where CWP normally causes a fall in oxygenation with exercise. Dr. Michos reported that Dr. Shahan and Dr. Gaziano, both B-readers, did not diagnose CWP by x-ray. Finally, Dr. Michos noted that the pulmonary function study revealed a reversible airflow obstruction consistent with the diagnosis of asthma. Dr. Michos opined that if the miner continues to smoke or is exposed to dusty conditions, his asthma will continue to worsen and total disability will eventually occur. Dr. Michos opined that an improvement in claimant's lung function is possible if claimant stops smoking.

Dr. Forehand examined the claimant on November 12, 1998. (DX 8). The claimant complained of a daily productive cough, wheezing, dyspnea, orthopnea and paroxysmal nocturnal dyspnea. A chest x-ray revealed peribronchial cuffing; a pulmonary function study showed an obstructive ventilatory pattern; and, an arterial blood gas study did not reveal hypoxemia at rest or with exercise. Dr. Forehand diagnosed chronic bronchitis due to a 25 year smoking history and 19 years of coal dust exposure. Dr. Forehand noted a significant respiratory impairment of a ventilatory nature and found the claimant had insufficient residual ventilatory capacity to return to his last coal mining job. Dr. Forehand found the claimant totally and permanently disabled.

Dr. McSharry, Board-certified in internal medicine with a subspecialty in pulmonary diseases and critical care medicine, examined the claimant on August 31, 1999. (DX 24). Dr. McSharry reported nineteen years of coal mine employment with his last job as a welder and mechanic. Claimant quit the mines in 1991 because of his inability to breathe and exercise. Dr. McSharry reported claimant smoked for 33 years between one fourth to one half a pack of cigarettes per day. At the time of the examination, claimant smoked less than two packs of cigarettes per week. Dr. McSharry found the electrocardiogram revealed a probable atrial enlargement; the chest x-ray suggested hyperinflation with no evidence of pneumoconiosis. Dr. McSharry noted that B-readers, Drs. Scott and Wheeler found emphysema and no pneumoconiosis. An arterial blood gas study showed hypercarbia and a mild reduction in PO₂ and the carboxyhemoglobin was elevated. A pulmonary function study test showed severe hyperinflation and obstructive lung disease with a bronchodilator response suggesting some component of asthma or asthmatic bronchitis, with no signs of restrictive lung disease. Dr. McSharry found no evidence of pneumoconiosis and noted the pulmonary function study showed no evidence of restrictive disease. Dr. McSharry opined that claimant's tests were typical of smoking induced obstruction and/or asthma. Dr. McSharry found that the abnormal arterial blood gases representative of asthma and emphysema, not caused by coal dust exposure. Dr. McSharry opined that the claimant's respiratory impairment is severe enough to cause shortness of breath with anything more than modest exertion. Dr. McSharry found claimant disabled from his last coal mine job. However, Dr. McSharry opined that his disability is not related to exposure to coal dust.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

Since this is the claimant's second claim for benefits, he must initially show that there has been a material change of conditions.⁵ To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (*en banc*); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995). See *Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale*, the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n.11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F. 3d 308 (3rd Cir. 1995).

The claimant's first application for benefits was denied because the evidence failed to show that: (1) the claimant had pneumoconiosis; (2) the pneumoconiosis arose, at least in part, out of coal mine employment; and (3) the claimant was totally disabled by pneumoconiosis. (DX 28-24). Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits. *Sharondale*.⁶ As discussed below, I find that the

⁵ Section 725.309(d) provides, in pertinent part:

In the case of a claimant who files more than one claim for benefits under this part, . . . [i]f the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the [Director] determines there has been a material change in conditions . . . (Emphasis added).

⁶ The provisions of § 725.309(d) are intended to provide claimants whose condition has materially changed, relief from the ordinary principles of res judicata. *Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554 (7th Cir. 1991); *Lukman v.*

claimant has established that he is totally disabled from performing his last coal mine employment. Therefore, I will consider the entire record in determining whether the claimant is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”⁷ 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to “coal workers’ pneumoconiosis,” but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201. The term “arising out of coal mine employment” is defined as including “any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.”

“ . . . [T]his broad definition ‘effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.’” *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) citing, *Rose v. Clinchfield Coal Co.*, 614 F. 2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995).

The Board has recently adopted the Director's position to hold that "a transient aggravation of a non-occupational pulmonary condition is insufficient to establish pneumoconiosis as defined at Section

Director, OWCP, 896 F.2d 1253 (10th Cir. 1990). If the claimant establishes a material change of condition, he must then proceed to prove all the elements required by the Act in order to show entitlement. *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*). “With respect to both res judicata and issue preclusion within the statutory and regulatory scheme of the black lung program, Congress specifically provided relief from the application of these doctrines only in two instances, both of them for the benefit of the claimant: in the filing of a request for modification, or in the filing of a duplicate claim . . . 20 C.F.R. § 725.309 and 725.310; *Lukman v. Director, OWCP*, 896 F.2d 1253 (10th Cir. 1990); *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990)(*en banc*).” The impact of these doctrines is that the claimant is foreclosed from relitigating any issue other than the four elements of entitlement.

⁷ Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1364; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3^d Cir. 1995) at 314-315.

718.201." *Henley v. Cowan and Co.*, 21 B.L.R. 1-148, BRB No. 98-1114 BLA (May 11, 1999).⁸

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 213, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after Jan. 1, 1982, with no evidence of complicated pneumoconiosis.

As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). In a case arising in the Sixth Circuit, the Board held it was proper for the judge to give greater weight to more recent evidence, as the Circuit has found CWP to be a "progressive and degenerative disease." *Cranor v. Peabody Coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999)(En banc). See *Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993) and *Mullins Coal Co. of Virginia v. Director, OWCP*, 483 U.S. 135 (1987).⁹

It is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, in as much as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later

⁸ As a result, the Board concluded that the ALJ erred in finding legal pneumoconiosis based upon medical opinions which diagnosed a temporary worsening of pulmonary symptoms due to exposure to coal dust, but no permanent effect. *Id.*

⁹ Improper to apply the "later evidence" rule where "all the interpretations of the most recent x-rays are negative and the second most recent x-ray taken on June 11, 1991 had conflicting interpretations." The Board concluded that, on remand the judge must analyze the evidence without reference to "its chronological relationship" but should consider the radiological qualifications of the physicians. *Bailey v. U.S. Steel Mining Co.*, 21 B.L.R. 1-152, BRB Nos. 97-1447 BLA & 97-1447 BLA-A (July 22, 1999)(*Recon. En banc*).

evidence is faulty as the earlier. . .” *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992). *See also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993).

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence. 20 C.F.R. § 718.202(a)(1). “[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays.” *Id.*; *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985).” (Emphasis added). (Fact one is board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

A judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31, 1-37 (1991).

There were sixteen readings of five x-rays, taken between September 24, 1979 and August 31, 1999. Of the sixteen readings, only one reading, by Dr. Sutherland, of the April 15, 1987 x-ray was positive. Because his qualifications are not of record, I do not afford Dr. Sutherland’s reading much weight. Furthermore, thirteen readings by doctors qualified as B-readers and/or Board-certified radiologists were negative for CWP. Therefore, I find the claimant has failed to establish CWP by x-ray evidence.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative x-ray. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician’s report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.¹⁰ *White v. Director*,

¹⁰ *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). “A ‘documented’ (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is ‘reasoned’ if the documentation

OWCP, 6 B.L.R. 1-368 (1983). Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

Dr. Forehand, Board-certified in allergy and immunology and a B-reader, issued three inconsistent reports. In March of 1995, Dr. Forehand based his opinion on 20 years of coal mine employment and diagnosed chronic bronchitis, cor pulmonale and CWP due to smoking and coal dust exposure. Subsequently, in July of 1995, Dr. Forehand amended his report to take in account only five years of coal mine employment. Dr. Forehand changed his opinion and found the claimant had cor pulmonale and chronic bronchitis due to cigarette smoking and did not diagnose CWP because of insufficient time in coal mine employment. In November of 1998, Dr. Forehand examined the claimant and reported 19 years of coal mine employment and a 25 year smoking history. In November of 1998, Dr. Forehand diagnosed chronic bronchitis due to both smoking and coal dust exposure. I find Dr. Forehand's reports to be inconsistent and not well reasoned. First, in March of 1995, based on 20 years of coal mine employment, Dr. Forehand diagnosed CWP. Subsequently, in July of 1995, he retracted his diagnosis of CWP to account for five years of coal mine employment. Dr. Forehand examined claimant in 1998, and report 19 years of coal mine employment and did not diagnose CWP. Although in November of 1998, Dr. Forehand found claimant's chronic bronchitis due to both cigarette smoking and coal dust exposure, I do not find his reports sufficient to establish CWP. Because Dr. Forehand is not as well qualified as Dr. Sharry, and Dr. Forehand's opinions are inconsistent and not well reasoned, I afford his opinion little weight.

Dr. Sutherland diagnosed emphysema and pneumoconiosis and was the only physician of record to diagnose a restrictive lung disease. Because Dr. Sutherland's qualifications are not of record and he does not explain the basis for his diagnoses, I do not afford his opinion great weight.

Dr. Michos, Board-certified in internal medicine and Board-eligible in pulmonary diseases, submitted a letter review of limited medical evidence, dated September 25, 1996. I find Dr. Michos' opinion not well reasoned and I do not afford his opinion much weight because he does not explain the etiology of his diagnosis of asthma. He does not explain whether claimant's asthma is caused by smoking, coal dust exposure, or both.

I afford the most weight to Dr. McSharry who is well qualified, Board-certified in internal medicine with a subspecialty in pulmonary diseases and critical care medicine. Dr. McSharry found no evidence of CWP and opined the x-ray, pulmonary function studies, and arterial blood gas studies showed no evidence of a restrictive disease and were typical of smoking induced obstruction and/or asthma. Dr. McSharry found the abnormal arterial blood gases were representative of asthma and emphysema, not caused by coal dust exposure. Dr. McSharry found the claimant's carboxyhemoglobin level elevated. Because of his qualifications and well reasoned opinions that claimant does not have CWP and claimant's other ailments, asthma and emphysema are smoking

supports the doctor's assessment of the miner's health. *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). . ."

induced, I afford Dr. McSharry's opinion great weight.

Although claimant may have emphysema, asthma, or bronchitis, which are diseases encompassed under the legal definition of CWP if caused by coal mine dust exposure, claimant has not shown that these diseases were caused by coal dust exposure. Therefore, I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b).

If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Ordinarily a miner with ten years or more of coal mine employment receives the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. The claimant stipulated to 9.943 years of coal mine employment. However, in view of my finding that the existence of CWP has not been proven this issue is moot.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b). Sections 718.204(c)(1) through (c)(5) set forth criteria to establish total disability: (1) pulmonary function studies with qualifying values; (2) blood gas studies with qualifying values; (3) evidence the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and (5) lay testimony.¹¹ Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

¹¹ 20 C.F.R. § 718.204(c). In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

I find Section 718.204(c)(3) is not applicable because only one physician, Dr. Forehand diagnosed cor pulmonale and, as discussed above, I found his opinion not well reasoned. § 718.204(c)(5) is not applicable because it only applies to a survivor's claim in the absence of medical evidence.

Section 718.204(c)(1) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. More weight may be accorded to the results of a recent ventilatory study over those of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). There were three pulmonary function studies performed between March 13, 1995 and August 31, 1999. All of the studies produced qualifying results. Therefore I find that the claimant has established total disability under section 718.204(c)(1).

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(c)(2). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). There were three arterial blood gas studies performed between March 13, 1995 and August 31, 1999. The March 13, 1995 and November 12, 1998 studies produced qualifying results at rest and non-qualifying results after exercise. The August 31, 1999 test produced non-qualifying results. Because of the varied results, I find the arterial blood gas studies inconclusive as to showing total disability.

Finally, total disability may be demonstrated, under § 718.204(c)(1), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b). Under this subsection, "... all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Camp Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

Dr. McSharry found claimant's respiratory impairment severe enough to cause shortness of breath with anything more than modest exertion and opined that the claimant is disabled from his last coal mining job. Dr. Forehand found claimant unable to return to his last coal mining job in all three of his reports. Dr. Sutherland also found claimant disabled. In September of 1996, Dr. Michos found that claimant was not currently disabled. However, Dr. Michos opined that if claimant continued to smoke or be exposed to dusty conditions, his asthma would worsen and total disability would occur.

The majority of physicians found the claimant totally disabled from his last coal mine job. Furthermore, as discussed above, I credit Dr. McSharry's well qualified and reasoned opinion that the claimant is unable to perform his last coal mine employment.

I find that the miner's last coal mining positions required moderate to heavy manual labor. Based on the qualifying pulmonary function studies and physicians' opinions, I find the claimant has established the existence of total disability.

E. Cause of total disability¹²

The Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" of the claimant's total disability.¹³ *Toler v. Eastern Associated Coal Co.*, 43 F. 3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

"A claimant must be totally disabled due to pneumoconiosis and any other respiratory or pulmonary disease, not due to other non-respiratory or non-pulmonary ailments, in order to qualify for benefits." *Beatty v. Danri Corp. & Triangle Enterprises*, 16 B.L.R. 1-11 (1991) *aff'd* 49 F.3d 993 (3d Cir. 1995) *accord Jewell Smokeless Coal Corp.* (So, one whose disability is only 10% attributable to pneumoconiosis would be unable to recover benefits if his completely unrelated physical problems (i.e., stroke) created 90% of his total disability). The fact that a physician does not explain how he could distinguish between disability due to coal mining and cigarette smoking or refer to evidence which supports his total disability opinion, may make his opinion "unreasoned." *Gilliam v. G&O Coal Co.*, 7 B.L.R. 1-59 (1984).

There is evidence of record that claimant's respiratory disability is due, in part, to his undisputed history of cigarette smoking. However, to qualify for Black Lung benefits, the claimant need

¹² *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. ___, BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a Doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

¹³ *Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996)(Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or substantial' cause." *Id.*

not prove that pneumoconiosis is the “sole” or “direct” cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors “specifically apportion the effects of the miner’s smoking and his dust exposure in coal mine employment upon the miner’s condition.” *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) citing generally, *Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990).

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990).¹⁴

Although a majority of the physicians agree that claimant has a respiratory disability and is disabled from his last coal mine employment, the claimant has not established that coal dust exposure contributed to his disability. As discussed above, claimant has not submitted substantial evidence to establish that he has pneumoconiosis or that coal dust exposure contributed to his asthma, emphysema or bronchitis. Therefore, claimant has failed to show that pneumoconiosis is a contributing cause of his total disability.

ATTORNEY FEES

The award of attorney’s fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has established that a material change in conditions has taken place since the previous denial, because he is now totally disabled. The claimant does not have pneumoconiosis, as defined by the Act and Regulations. He has not proven pneumoconiosis arose out of his coal mine employment. The claimant is totally disabled. His total disability is not due to pneumoconiosis. He is therefore not entitled to benefits.

¹⁴ “By adopting the ‘necessary condition’ analysis of the Seventh Circuit in *Robinson*, we addressed those claims . . . in which pneumoconiosis has played only a de minimis part. *Robinson*, 914 F.2d at 38, n. 5.” *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195 n. 8 (4th Cir. 1995).

ORDER

It is ordered that the claim of JERRY RODNEY HAGY for benefits under the Black Lung Benefits Act is hereby DENIED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

